Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

SFIC PROPERTIES, INC.,

Plaintiff/Appellee/Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, aka IAMAWD,

Defendant/Appellant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether arbitration awards must still be upheld by the courts when the arbitrator's decision is not based on a plausible interpretation of the parties' collective bargaining agreement.

2. Whether arbitrators may properly infer a just cause for termination requirement into every modern day collective bargaining agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the above caption. The parent company of Plaintiff/Appellee/Petitioner SFIC Properties, Inc. ("SFIC") is Santa Fe (U.S. Holdings) Inc. SFIC has no nonwholly owned subsidiaries.

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BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on December 27, 1996. SFIC petitioned for a rehearing, and the order denying the petition was entered on March 10, 1997. This Court has jurisdiction to review the above judgment, by writ of certiorari, pursuant to 28 U.S.C. section 1254.

STATEMENT OF THE CASE

On December 15, 1994, the Honorable James M. Ideman, United States District Judge, granted SFIC's Motion for Summary Judgment, and vacated the arbitration award against it. (Appendix at App. 15.) The District Court had jurisdiction pursuant to 29 U.S.C. section 185(a). The Respondent herein, International Association of Machinists and Aerospace Workers, Lodge No. 94 and Local Lodge No. 311 (the "Union"), in whose favor the arbitration award was rendered, then appealed to the Ninth Circuit Court of Appeals.

The underlying dispute involved the discharge of SFIC's employee, Julio Rodriguez, who had engaged in sexual harassment of a female employee and other workplace violations. (Appendix at App. 24.) An arbitration between the Union and SFIC followed, taking place on June 3, 1992. The arbitration was required by the collective bargaining agreement between the parties. (The relevant pages of the collective bargaining agreement, entitled "Machinists Maintenance Agreement," is attached to the Appendix at App. 36-47, and is hereinafter referred to as the "Agreement".)

On April 11, 1994, some two years after the arbitration, Arbitrator George E. Marshall, Jr. rendered his Award, ordering that Julio Rodriguez be reinstated with full back pay. (Appendix at App. 30-33.) In so doing, Arbitrator Marshall imposed terms and conditions upon SFIC *which did not exist in the parties' Agreement, and moreover were directly contradicted by the Agreement's express terms.* These new requirements included (1) that there be "just cause" for termination; and (2) that employees be given "notice of wrongdoing and an opportunity to correct the errant behavior" before termination. (Arbitrator's Award, ¶¶ 1.a), b) and e).)

While SFIC contends that there was ample "just cause" to terminate an employee like Julio Rodriguez, cause should not have been a requirement for SFIC to take such action. Numerous provisions of the Agreement grant SFIC the right to terminate its employees with or without good cause, including:

> Article I A):
>
> " . . . [T]he Company retains *full and exclusive authority over the management of its operations* except as expressly limited by the Agreement." [Emphasis added.]
>
> Article II A):
>
> "Except as specifically modified, delegated or granted in this Agreement, the Company retains the *exclusive right* to manage the business of the facility and the direction of the work force. Among those *exclusive rights* of the Company, but not limited thereto, is management's right to . . . direct the work-force; to hire, promote, transfer, lay off, demote, suspend, *discipline and*

> *discharge employees*. . . . Except as otherwise limited herein, such matters are the responsibilities and *prerogatives* of the Company. . . . Rights not expressly waived by this Agreement shall be retained by the Company." [Emphasis added.]
>
> Article XVI. C.:
>
> "Upon termination *for any reason*, employees shall be entitled to pay for any unearned vacation. . . . " [Emphasis added.]
>
> Article XIX. B.:
>
> "Upon termination *for any reason*, employees with four (4) months or more of continuous service shall be paid for all unused sick leave." [Emphasis added.]

Notwithstanding these provisions, Arbitrator Marshall "inferred" a just cause for termination requirement, relying on Article IX of the Agreement. (Arbitrator's Award, ¶¶ 1. a) and b.) Article IX states in relevant part:

> "Seniority is lost when service is interrupted according to the following: . . . (e) Dismissal for cause."

This clause, however, can only support SFIC's right to terminate with ***or without*** *cause*. It provides that *if* an employee's service to SFIC is interrupted due to a dismissal for cause, and that employee is later rehired, he loses his seniority. If, on the other hand, the dismissal was "*without cause*", the employee retains his seniority. In no way does this provision limit the ability of the company to dismiss an employee with or without cause.

Arbitrator Marshall was also operating under the misguided notion that "just cause will be inferred in all

modern day collective bargaining agreements which do not expressly contain a 'just cause' standard for discharge provision." (Arbitrator's Award, ¶ 1. a).) In an effort to prevent arbitrators from so deviating from the terms of the contract, the Agreement expressly limited the arbitrator's authority. Under Article 8 B):

> "The Arbitrator shall have the authority to *interpret and apply* the applicable provisions of this Agreement, but he shall *not* have the authority to *amend or modify this Agreement or to establish new terms and conditions of this Agreement.*" [Emphasis added.]

Arbitrator Marshall thus violated the authority granted to him under the parties' Agreement, and his Award was vacated by the District Court. But, by a two to one margin, the Ninth Circuit Court of Appeals reversed, holding that:

(1) Provided the arbitrator bases his decision on language contained in the collective bargaining agreement, no matter how erroneous his interpretation, the award must be upheld by the courts (Appendix at App. 5-8); and

(2) An arbitrator may infer a just cause for discharge requirement into every modern day collective bargaining agreement that does not contain such a provision (Appendix at App. 7-10.)

ARGUMENT

For the following reasons, SFIC respectfully urges this Court to grant this petition for a writ of certiorari:

1. THE NINTH CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. When May The Courts Vacate An Arbitration Award That Is Based On An Erroneous Interpretation Of The Collective Bargaining Agreement?

This Court of Appeals decision fundamentally affects the arbitration of labor disputes, and creates a highly dangerous precedent. As shown above, the language of the parties' collective bargaining agreement cannot, under any plausible interpretation, require just cause for termination. Nevertheless, the Ninth Circuit upheld the Arbitration Award against SFIC, *making no attempt to explain how the arbitrator's construction of the contract was possible.*

This precedent thus tells arbitrators that all they need to do to avoid judicial scrutiny, and impose their own brand of industrial justice, is point to some language in the contract upon which their award is purportedly based. Even if that contractual language in no way supports their decision, and even if such language actually contradicts it (as here), the courts will not intervene.

In setting forth the judicial standard of review of arbitration awards, this Court has stated:

> "[A]n arbitrator is *confined to interpretation and application* of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the Arbitrator's Award manifests infidelity to this obligation, courts have no choice but to refuse enforcement of the award." (*United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960).) [Emphasis added.]

Hence, the courts' deference to arbitration awards does not grant an arbitrator unrestrained authority.

In the case of *Cement Division, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759, 766 (6th Cir. 1986), the Sixth Circuit Court of Appeals enumerated the circumstances in which an arbitration award does not draw its essence from the collective bargaining agreement:

> "An award fails to derive its essence from the agreement when (1) an award conflicts with express terms of the collective bargaining agreement . . . (2) an award imposes additional requirements that are not expressly provided in the agreement . . . (3) an award is without rational support or cannot be rationally derived from the terms of the agreement . . . and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement. . . . "

Arbitrator Marshall's award falls within all four of these grounds.

As also stated, for example, in the First Circuit Court of Appeals decision of *Georgia-Pacific Corp. v. Local 27*, 864 F.2d 940 (1st Cir. 1988), "The arbitrator may not ignore the plain language of the contract. . . . If the language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement." (*Id.* at 946.) To allow an arbitrator to ignore the explicit language of the contract by substituting his own brand of industrial justice for that agreed to by the parties would not only do violence to the agreement's provision which prohibits the arbitrator from modifying, changing or adding to the terms of the contract, but would promote industrial anarchy by encouraging the exercise of ad hoc arbitral revision of collective bargaining agreements. (*Id.*)

In the instant Opinion, the Ninth Circuit relied upon the case of *Phoenix Newspaper, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993), for the rule that arbitration awards must be upheld so long as they represent a "plausible interpretation" of the contract. (Appendix at App. 5.) (See, also, *Federated Dep't Stores v. United Food & Commercial Workers Union*, 901 F.2d 1494, 1496 (9th Cir. 1990).) Accordingly, for an arbitration award to be valid, it is not enough that the arbitrator merely purport to interpret the collective bargaining agreement, but his interpretation must be a "plausible" one.

In reversing the District Court's judgment and upholding this arbitration award, however, the Ninth

Circuit *emasculated* the above principle. Merely because Arbitrator Marshall premised his award on contractual language in the seniority provision, the Ninth Circuit held that he satisfied the "essence" test under *Phoenix Newspaper* (i.e., that the arbitrator's decision draw its essence from the contract). (Appendix at App. 7-8.) However, *Phoenix Newspaper* required more than the *phantom standard* enunciated in this Opinion to uphold an arbitration award. The arbitrator's interpretation of the contract must be *"plausible"*. (*Phoenix Newspaper*, 989 F.2d at 1080.)

SFIC recognizes that public policy favors the finality of industrial disputes and that, therefore, courts should normally defer to the arbitrator's discretion. However, *no public policy is served* when an arbitrator can, without any effective restriction whatsoever, twist and distort the clear language of a contract. If allowed to occur by the courts, as will surely happen in the Ninth Circuit if this Opinion is not reversed, it will *deter* companies from agreeing to arbitration of grievances.

B. May Arbitrators Infer A Just Cause Provision Into Every Modern Day Collective Bargaining Agreement?

While an arbitrator may certainly rely on industry practices to aid him in interpreting a collective bargaining agreement, he just as certainly cannot imply terms which contradict the agreement's express language. As indicated in *Phoenix Newspaper*, although an arbitrator is not bound by the four corners of the contract, he cannot ignore the plain language of the document. (*Phoenix*

Newspaper, 989 F.2d at 1081.) Further, under *Jasper Cabinet Co. v. United Steel Workers of America*, 77 F.3d 1025, 1028 (7th Cir. 1996), cited in the Opinion at App. 6, an award cannot draw its essence from the collective bargaining agreement "when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract. . . . "

The practice of inferring a just cause provision into every modern day collective bargaining agreement not only does violence to the particular Agreement before this Court, but to the law of labor contracts in general. In *Local Union No. 2812 v. Missoula White Pine Sash Co.*, 734 F.2d 1384 (9th Cir. 1984), cert. denied, 470 U.S. 1085 (1985), the Ninth Circuit stated:

> "Generally, unless restricted by the collective bargaining agreement, an employer may discharge an employee for good cause, bad cause, or no cause at all without violating the National Labor Relations Act as long as the motivation is not to punish protected union activity." (Id. at 1387.) (Pursuant to California Labor Code section 2922, California law agrees.)

The *Missoula* court also stated:

> "Cause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit." (*Id.*)

Therefore, the courts should not, as the Ninth Circuit has just done, stamp their seal of approval on the practice of arbitrators of "inferring" just cause provisions into

every modern day collective bargaining agreement, *which practice is without any statutory support, case law support, and moreover is directly* ***contrary*** *to established law.* This is especially so here, where the Agreement plainly allows for termination with or without cause; directly forbids the arbitrator from "amend[ing] or modify[ing] this Agreement or establish[ing] new terms and conditions"; and provides that the written instrument "constitutes the full and complete understanding of the parties. . . . " (Article XXIV).

2. THIS NINTH CIRCUIT OPINION IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

As demonstrated above, the instant decision, which essentially gives free reign to arbitrators, is in conflict with those Court of Appeals decisions which impose some restraint on arbitrators' authority. So as not to burden the Court with repetitious argument, SFIC will simply outline such conflicting decisions here.

A. Decisions Imposing Restraint On Arbitrators' Authority:

First Circuit: If the language of an agreement is clear and unequivocal, an arbitrator cannot give it a meaning other than that expressed by the agreement. (*Georgia-Pacific Corp. v. Local 27*, 864 F.2d 940, 946 (1st Cir. 1988).)

Sixth Circuit: An award fails to derive its essence from the collective bargaining agreement when an award conflicts with express terms of the agreement or imposes

additional requirements that are not expressly provided in the agreement. (*Cement Division, National Gypsum Co. v. United Steelworkers of America*, 793 F.2d 759, 766 (6th Cir. 1986).)

Seventh Circuit: An award cannot draw its essence from the collective bargaining agreement when the arbitrator must have based his award on some body of thought, feeling, policy, or law that is outside the contract. (*Jasper Cabinet Co. v. United Steel Workers of America*, 77 F.3d 1025, 1028 (7th Cir. 1996).)

Ninth Circuit: An arbitration award must represent a "plausible interpretation" of the collective bargaining agreement. (*Phoenix Newspaper, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993).)

B. This Decision Imposing Effectively No Restraint On Arbitrators' Authority:

The Instant Ninth Circuit Decision: Provided the arbitrator bases his decision on language contained in the collective bargaining agreement, no matter how erroneous his interpretation, the award must be upheld by the courts. (Appendix at App. 5-8.)

Thus, a decision from this Court is imperative to secure uniformity of law.

CONCLUSION

Given the nationwide importance of the proper arbitration of labor disputes, and the fact that this Ninth

Circuit Opinion goes to the very heart of an arbitrator's authority, SFIC respectfully urges this Court to grant this petition.

Dated: June 6, 1997

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SFIC PROPERTIES, INC., *Plaintiff-Appellee,* v. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, aka: IAMAWD, *Defendant-Appellant.*	No. 95-55139 D.C. No. CV-94-04870-JMI OPINION

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Argued and Submitted
June 5, 1996 – Pasadena, California

Filed December 27, 1996

Before: Melvin Brunetti and Pamela Ann Rymer,
Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Brunetti;
Dissent by Judge Rymer

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* Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY

Labor and Employment/Arbitration

The court of appeals reversed a district court judgment. The court of appeals held that an arbitrator's award draws its essence from a collective bargaining agreement (CBA) when it was based on the rationale that a just cause requirement is inferred in all modern agreements without an express provision.

Appellee SFIC Properties, Inc. had a CBA with appellant International Association of Machinists and Aerospace Workers, District Lodge 34, Local Lodge 311 (IAMAWD). SFIC discharged Julio Rodriguez. An arbitrator inferred a just cause requirement in the CBA from two rationales: the presumption that modern CBAs imply a just cause requirement, and from the seniority clause in the CBA which provided that seniority was lost when an employee was dismissed for cause. The arbitrator concluded that the CBA's provision that management would have the exclusive right to discharge employees did not refute the implication of a just cause requirement. The arbitrator ruled for Rodriguez and ordered his reinstatement with back pay.

The district court concluded that the award did not draw its essence from the CBA and that the arbitrator, therefore, exceeded his authority in issuing the award. The court granted summary judgment to SFIC and vacated the arbitrator's award. The IAMAWD appealed.

[1] An exception to the general deference accorded to an arbitrator's award is made when the award does not

draw its essence from the CBA. [2] An award draws its essence from the CBA when it is based on language in the CBA. [3] An award may also be upheld if it is based on the arbitrator's understanding of industry practices.

[4] Both of the arbitrator's rationales independently supported the award. [5] While the arbitrator's award may have been based on a misreading of the CBA, it satisfied the "essence" test because it was based on contract language in the seniority provision.

[6] The arbitrator's rationale that just cause requirements are inferred from all modern CBAs which do not contain an express provision was also a sufficient basis for upholding the award. [7] An award based on an arbitrator's understanding of industrial practices draws its essence from the CBA. [8] As it is very common for arbitrators to infer just cause requirements from CBAs which are silent on the issue, the award drew its essence from the CBA between SFIC and the IAMAWD.

[9] Because the award and inference of the just cause requirement drew their essence from the CBA, the arbitrator did not exceed his authority.

Judge Rymer dissented, writing that the award failed to draw its essence from the CBA and could not be a plausible interpretation of the agreement.

COUNSEL

Michele S. Ahrens, Tredway, Brandmeyer & Lumsdaine, Downey, California, for the plaintiff-appellee.

Herbert M. Ansell and Geoffrey D. Chin, Los Angeles, California, for the defendant-appellant.

OPINION

BRUNETTI, Circuit Judge:

An arbitrator ruled in favor of SFIC Properties, Inc., employee Julio Rodriguez and ordered his reinstatement with back pay. The district court granted summary judgment to SFIC and vacated the award, concluding that the arbitrator erred in finding an implied just cause requirement. Rodriguez' union, the International Association of Machinists & Aerospace Workers, District Lodge 94, appealed. We review the district court's award of summary judgment *de novo*, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), and we reverse.

I.

SFIC terminated employee Julio Rodriguez purportedly for sexually harassing a female employee and other workplace violations. After inferring a just cause requirement from the collective bargaining agreement ("CBA"), an arbitrator ordered Rodriguez' reinstatement based on a finding that the company had failed to provide Rodriguez with any notice of his wrongdoing and an opportunity to correct his behavior. The arbitrator found that Rodriguez was never apprised of many of the reasons for his dismissal at the time he was dismissed. The arbitrator inferred a just cause requirement in the CBA from the presumption that modern CBA's imply a just

cause requirement and the seniority clause which provides that seniority is lost when, inter alia, an employee is dismissed for cause. The arbitrator concluded that the CBA's provision that management would have the exclusive right to discharge employee did not refute the implication of a just cause requirement.

The district court vacated the arbitrator's award. The court relied both on Ninth Circuit non-arbitration case law suggesting that it is inappropriate to infer a just cause requirement and the latitude afforded management by the CBA. The court concluded that because the award did not draw its essence from the collective bargaining agreement the arbitrator exceeded his authority in imposing a just cause requirement.

II.

"The scope of review of an arbitrator's decision in a labor dispute is extremely narrow." *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990). Arbitration awards are upheld so long as they represent a "plausible interpretation of the contract." *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993). "A reviewing court is bound – under all except the most limited circumstances – to defer to the decision of [the arbitrator], even if . . . that . . . decision finds the facts and states the law erroneously." *Phoenix*, 989 F.2d at 1080 (quoting *Stead Motors v. Automotive Machinists Lodge 1173*, 886 F.2d 1200, 1204 (9th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990)).

[1] This court has identified three exceptions to the general deference to an arbitrator's award: (1) when the award does not "draw its essence from the collective bargaining agreement"; (2) when the arbitrator exceeds the scope of the issues submitted; and (3) when the award runs counter to public policy. *Federated,* 901 F.2d at 1496. The district court concluded that the arbitrator's award in favor of Rodriguez did not draw its essence from the CBA and that therefore the arbitrator exceed his authority in issuing the award.

[2] An award draws its essence from the CBA when it is based on language in the CBA. *See Stead,* 886 F.2d at 1205 n.6 ("This term [fails to draw its essence] is reserved for those egregious cases in which a court determines that the arbitrator's award ignored the plain language of the contract, that he manifestly disregarded the contours of the bargain expressed in outline by the collective bargaining agreement."); *Jasper Cabinet Co. v. United Steelworkers of America, AFL-CIO-CLC, Upholstery and Allied Division,* 77 F.3d 1025, 1028 (7th Cir. 1996) ("We will uphold an arbitrator's award based upon a misreading of the contract so long as the arbitrator's interpretation is derived from the language of the contract."); *Sullivan v. Lemoncello,* 36 F.3d 676, 683 (7th Cir. 1994) ("All that is required is that the arbitrator's interpretation of the collective bargaining agreement is derived from the language of the requirement."); *Loveless v. Eastern Air Lines, Inc.,* 681 F.2d 1272, 1279 (11th Cir. 1982) (Awards not drawing their essence from the CBA reflect neither the language of the CBA nor the intent of the parties).

[3] An award may also be upheld if it is based on the arbitrator's understanding of industry practices. *Federated*, 901 F.2d at 1497. An arbitrator is "not confined to the express terms of the contract" but may also consider the "industrial common law" which "is equally a part of the collective bargaining agreement although not expressed in it." *Id.* "The arbitrator's finding is not beyond the essence of the contract if it is derived from the arbitrator's unique expertise." *Id.*

The arbitrator inferred a just cause requirement from two sources. First he noted that "sufficient or just cause requirements will be inferred in all modern day collective bargaining agreements which do not contain an express 'just cause' standard for discharge provision." Second, he concluded that the CBA's seniority section, which stipulates that in the event of "dismissal for cause" an employee loses his seniority, implied a just cause requirement.

[4] Both rationales independently support the award under the case law of this and other circuits. One could argue that the just cause language in the seniority provision cuts against Rodriguez and the union in that by stating that employees terminated for cause lose their seniority, it implies that employees terminated without cause will not lose their seniority rights thereby suggesting that the company has the right to terminate without cause. That interpretation would be bolstered by the language providing management broad authority in managing the work force.

[5] However, even if this court disagrees with the arbitrator's interpretation, it will uphold it so long as it

draws its essence from the contract. *Phoenix*, 989 F.2d at 1080. Thus while the arbitrator's award may be based on a misreading of the CBA, it satisfies this "essence" test because it is based on contract language in the seniority provision. *See* id.; *Jasper Cabinet*, 77 F.3d at 1028. As the CBA does not expressly provide that employees may be terminated without cause, the arbitrator's award is not one of "those egregious cases" in which an arbitrator ignored the "plain language" of the CBA. *See Stead*, 886 F.2d at 1205 n.6.

[6] The arbitrator's first rationale – just cause requirements are inferred from all modern day CBA's which do not contain an express provision – is also a sufficient basis for upholding the award. In *Federated*, this court held that the [sic] an award draws its essence from the CBA even when it is based not on the language in the CBA but rather on the arbitrator's understanding of industry and practices, i.e. industrial common law. 901 F.2d at 1497. *See also United Food and Commercial Workers Int'l, AFL-CIO, Local Union No. 634 v. Gold Star Sausage Co.*, 487 F. Supp. 596, 600 n.7 (D. Colo. 1980) ("industrial common law" relied on by arbitrators need not be particular to a certain industry but can include concepts common to labor contracts). The court concluded that "because it is not unusual for an arbitrator to apply due process notions to just cause, the arbitrator derived his decision from the essence of the collective bargaining agreement." *Federated*, 901 F.2d at 1497.

[7] Although the issue in *Federated* was whether a just cause requirement implied due process protections rather than the implication of a just cause requirement as in the instant case, the court's analysis was not limited to that

set of facts. This court broadly stated that an award based on the arbitrator's understanding of industrial practices draws its essence from the collective bargaining agreement. *Id.* The court's citation for that proposition to *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 575, 581-82 (1960), in which the issue was whether a dispute over contracting-out work was subject to arbitration, underscores the general ability of arbitrators to rely on their understanding of industrial common law. *See id.*

[8] As it is very common for arbitrators to infer just cause requirements from CBA's which are silent on the issue, the award in the instant matter drew its essence from the CBA between SFIC and the union. *See id. See also Smith v. Kerrville Bus Co.*, 709 F.2d 914, 917 (5th Cir. 1983) ("In instances where the language of a collective contract does not explicitly prohibit dismissal except for just cause, arbitrators typically infer such prohibitions from seniority clauses or grievance and arbitration procedures."); *Zellenbach Paper Co.*, 73 Lab. Arb. (BNA) 1140, 1142 (1979) (Sabo, Arb.) ("[E]ven where a contract fails to include any general limitations as to the right to discharge, arbitrators have concluded that a just cause restriction is implied in a modern Collective Bargaining Agreement."); Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 Am. U. L. Rev. 849, 910 (1994) ("So strong is the tradition of just cause in arbitral jurisprudence that many arbitrators have inferred the existence of a just-cause standard in agreements that did not expressly state such a standard."); Gary Minda and Katie R. Raab, *Time For an Unjust Dismissal Statute in New York*, 54 Brook. L. Rev. 1137, 1192-93 (1989) ("[I]f a just cause requirement is

missing from the agreement, the arbitrator infers its existence from the seniority clause or grievance and arbitration provision."). The arbitrator's conclusion concerning the broad practice of inferring just cause requirements is well-supported and thus under *Federated* the award draws its essence from the CBA. *See Federated,* 901 F.2d at 1497.

The district court relied heavily on *Local Union No. 2812 v. Missoula White Pine Sash,* in which this court refused to infer a just cause requirement from a CBA. 734 F.2d 1384, 1387 (9th Cir. 1984), *cert. denied,* 470 U.S. 1085 (1985). *Missoula,* however, is largely irrelevant in this context because it involved direct interpretation of a CBA as opposed to review of an arbitrator's interpretation of a CBA. *See Stead,* 886 F.2d at 1205 ("the award, just as a contract, is the expression of the parties' will and must be enforced as expressed unless illegal or otherwise void."). Furthermore, in *Dickeson v. DAW Forest Products Co.,* decided three years after *Missoula,* this court noted that it is "difficult to imagine a meeting of the minds between an employer and a union authorizing an employer to discharge an employee without good cause." 827 F.2d 627, 631 (9th Cir. 1987)

[9] Finally, the district court also suggested that the arbitrator exceeded his authority because he effectively added a new term to the agreement. To infer a requirement is to find it already in the CBA, albeit only implied, rather than to add a new requirement. Thus because the award and inference of the just cause requirement draw their essence from the CBA, the arbitrator did not exceed his authority.

REVERSED and REMANDED with instructions to enforce the arbitrator's award.

RYMER, Circuit Judge, dissenting:

While there is no question that the scope of review of an arbitrator's decision in a labor dispute is extremely narrow, still awards must represent a "plausible interpretation of the contract." *Phoenix Newspapers, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1992). When the CBA has a management rights clause that explicitly gives the company the exclusive right to discharge employees,[1] and that right is unfettered by any constraint elsewhere in the agreement which could arguably import a "cause" requirement into the process, I have a hard time understanding how the arbitrator's finding that "sufficient or just cause will be inferred in all modern day collective bargaining agreements which do not contain an express 'just cause' standard for discharge provision" can possibly "draw its essence from the collective bargaining agreement." *Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990) (noting this as exception to general deference to arbitrator's award).

We have previously considered when a cause standard can, and when it cannot, be implied in a collective

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[1] "Except as specifically modified, delegated or granted in this Agreement, the Company retains the exclusive right . . . to hire, promote, transfer, lay off, demote, suspend, discipline and discharge employees . . . " Article II(A) Management of Operations.

bargaining agreement. On the one hand, in *Local Union No. 2812 v. Missoula White Pine Sash*, 734 F.2d 1384, 1387 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), we found no basis in the agreement for implying a just cause standard for discharge in the face of a management rights clause that gave the company "the sole and exclusive right to hire, discipline and discharge any employee," and in the absence of any other language that limited the company's right to discharge at will. On the other hand, in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627, 630 (9th Cir. 1987), we implied a "good cause" standard for discharge because the grievance procedure specifically contemplated a finding that an employee was "unjustly discharged" or else the employee must be reinstated, and there was no provision concerning management's prerogative over discharge. Between these bookends, it seems to me that SFIC's collective bargaining agreement is like White Pine's and unlike DAW's: the SFIC contract has an express clause stating that the company has the exclusive right to discharge, and the SFIC grievance procedure does not contemplate a finding as to whether a discharge is made with cause. Just as we couldn't see any basis in the agreement for implying a cause requirement in *White Pine*, I can't see any way that implying a "cause" requirement in SFIC's agreement is a "plausible interpretation of the contract."

The arbitrator relied on the Seniority provision[2] in finding that the parties intended to have a "cause"

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[2] It provides in relevant part:

> A) Seniority is defined as the status secured by length of service while in the continuous employ of the Company. Seniority is lost when service i

standard, but at most that provision implies that "cause" matters when an employee whose service has been interrupted is recalled. Indeed, the only inference plausibly arising out of this provision is that some dismissals *may* be without cause (in which case if the employee is later rehired, he keeps his seniority whereas if his dismissal were with cause, he loses it).

The arbitrator also apparently relied on his own understanding of industrial practice in finding that just cause "will be inferred in all modern day collective bargaining agreements." However, the SFIC agreement expressly states that an arbitrator "shall not have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement." Article VIII(B) Arbitration. It seems to me that this is just what implying a "cause" standard does in this case. In any event, the arbitrator's ability to draw on his own understanding of industrial practices cannot possibly mean that whatever he says about "modern day collective bargaining agreements" will "draw[ ] its essence from the collective bargaining agreement" at issue – regardless of the extent to which it conflicts with the express language of the particular agreement, and without regard to how courts have construed the terms of virtually identical agreements.

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interrupted according to the following: . . . (e) Dismissal for cause.

Article IX Seniority.

Because I believe that the award fails to draw its essence from the CBA and cannot be a plausible interpretation of the agreement, I would affirm.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SFIC PROPERTIES, INC., Plaintiff, v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311, Defendants.	CV-94-4870 JMI (JGx) **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND VACATING ARBITRATION AWARD** **ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** (Filed Dec. 15, 1994)

IT IS HEREBY ORDERED:

Plaintiff SFIC PROPERTIES, INC.'s Motion for Summary Judgment and defendants INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311's Motion for Summary Judgment came before this Court for review on December 5, 1994. After careful consideration, the Court hereby GRANTS plaintiff's motion and DENIES defendants' motion. The arbitration award is vacated.

BACKGROUND

On June 3, 1992, plaintiff and defendants had an arbitration proceeding before George E. Marshall, Jr. (hereinafter "Marshall"). The case involved the termination of plaintiff's employee, Julio Rodriguez (hereinafter "Rodriguez"), who had allegedly engaged in sexual harassment of a female employee and other general workplace violations. Two years later, on April 11, 1994, Marshall announced his ruling in favor of defendants and the employee. Marshall indicated that the employee's termination was improper because the employee had not been terminated for just cause. He also found that it was improper because Rodriguez had not received notice of his problematic behavior. According to the arbitrator, notice would have provided Rodriguez an opportunity to correct his behavior. The employee was reinstated with full back pay.

Plaintiff appealed the arbitrator's award to this Court on the grounds that it was improper for the arbitrator to imply terms such as "just cause" and "notice" into the collective bargaining agreement in reaching his decision. Plaintiff now brings this motion for summary judgment on this precise issue. Defendants file a cross-motion for summary judgment and argue that the arbitration award should be enforced because the arbitrator had the authority to imply these terms into the collective bargaining agreement.

DISCUSSION

I. Review of Arbitrator's Award

A. Jurisdiction

The Court has jurisdiction to review the arbitrator's award pursuant to 29 U.S.C. § 185(a). However, the scope of review is narrow. A court may overturn an arbitrator's award only if the award does not "draw[ ] its essence form the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

B. Standard of Review

Pursuant to Federal Rule of Civil Procedure 56, a court may grant summary judgment if the pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." There are no disputes between the parties as to the general facts of this case. Therefore, this case can properly be resolved by summary judgment. The only question for the Court is whether the arbitrator exceeded his authority by basing his decision on terms that were not specifically stated in the collective bargaining agreement.

II. The Arbitrator's Award

In reaching his decision, the arbitrator noted that a "just cause" standard is to be inferred in all modern day collective bargaining agreements and particularly when the word, "cause," appears elsewhere in the collective bargaining agreement. Plaintiff's Motion for Summary

Judgment (hereinafter "Plaintiff's Motion"), Exh. 1, p. 16 – Discharge of Julio Rodriguez, Arbitrator's Award (hereinafter "Award"), ¶ 1(a), (b). In this case, the seniority provision, Article IX.A., lists "[d]ismissal for cause" as one factor for which an employee loses seniority. Plaintiff's Motion, Exh. 2, p. 21 – Machinists Maintenance Agreement (hereinafter "Agreement"), Article IX.A(e). According to the arbitrator, the presence of the term, "cause," in the seniority provision reveals that "the parties intended to have a 'cause' standard for discharge." Plaintiff's Motion, Exh. 1, p. 16 – Award, ¶ 1(b). Moreover, the arbitrator maintained that a cause standard requires that an employee be given "notice of wrong doing, and an opportunity to correct the errant behavior." Plaintiff's Motion, Exh. 1, p. 16 – Award, ¶ 1(e). He concluded by finding that the employee had not been given sufficient notice and that, based on the information SFIC had at the time of discharge (only the incident of sexual harassment), Rodriguez' discharge was not based on just cause. Plaintiff's Motion, Exh. 1, p. 17 – Award, ¶¶ 1(e), 2.

III. Employer's Right to Discharge

In California, an employment contract is presumed to be at-will. *See Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 665 (1988). That presumption can be "superseded by a contract, express or implied, limiting the employer's right to discharge the employee." *Id.* An employer's right to discharge an employee at will is also limited by public policy considerations. *Id.* The Court's review of the award

in this matter focuses on the collective bargaining agreement. Public policy considerations are not at issue in this action.

In this case, there was no express contract term in the collective bargaining agreement limiting plaintiff's right to discharge its employees. In fact, the plaintiff's right to discharge is quite broad. Article II.A. of the collective bargaining agreement states that "[t]he Company retains the exclusive right to manage the business of the facility and the direction of the work force. Among those exclusive rights of the Company, but not limited thereto, is management's right to . . . discipline and discharge employees. . . . " Plaintiff's Motion, Exh. 2, p. 18 – Agreement, Article II.A. This provision strongly suggests that the employer has unlimited authority over employment termination decisions.

Although no express term existed, the arbitrator found that the collective bargaining agreement contained an implied requirement that just cause exist for discharge. The Court must consider whether it was appropriate for the arbitrator to make this inference.

IV. Implied Requirement of Discharge Only for Just Cause

Defendants maintain that it is common practice for arbitrators to infer terms such as "just cause" and "notice" into a collective bargaining agreement. In fact, they cite a long list of arbitration opinions where arbitrators inferred just cause standards into collective bargaining agreements. Therefore, they contend, the arbitrator in this case was justified in inferring these terms. However,

Article VIII.B. of the collective bargaining agreement indicates that although the arbitrator can interpret the collective bargaining agreement, the arbitrator "shall not have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement." Plaintiff's Reply to Opposition to Motion for Summary Judgment, Exh. 7, p. 10 – Agreement, Article VIII.B. The Court finds that the arbitrator's award had the effect of adding new terms to the collective bargaining agreement. Thus, it was inappropriate for the arbitrator to infer terms into the agreement.

Support for this finding comes from the Ninth Circuit. Although the Ninth Circuit has not addressed in great detail the issue of inferring a just cause standard into a collective bargaining agreement, the few opinions that do exist suggest that the arbitrator did exceed his authority by inferring these terms.

In *Local Union No. 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), the court, relying upon the collective bargaining agreement's inclusion of a provision similar to the management provision in this case conferring upon the employer the exclusive right to discharge and discipline an employee, determined that the intent of the parties was that a showing of just cause would not be required for termination. As the court suggested, "[c]ause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit." *Id.* at 1387. Thus, it held that it was

inappropriate to infer a cause standard into the collective bargaining agreement.

The Ninth Circuit reached a different conclusion in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), but that case can be distinguished from this one. In *Dickeson*, the collective bargaining agreement did not contain a just cause standard. However, the grievance procedure required a determination that just cause existed for the discharge. Because of this requirement, the court found that it was appropriate to infer a just cause term into the collective bargaining agreement. In the present case, however, the parties have provided no evidence that the grievance procedure requires a determination of just cause for discharge. Thus, the present case more closely resembles *White Pine*. Based on *White Pine*, it was improper for the arbitrator to infer a just cause term into the collective bargaining agreement.

V. Conclusion

The Court finds that the arbitrator exceeded his authority in reaching his decision. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a requirement of notice into the collective bargaining when it was clear that the collective bargaining agreement gave plaintiff unlimited control over discharge. Therefore, the Court grants plaintiff's motion for summary judgment and vacates the arbitrator's award. Defendants' motion for summary judgment is denied. The Court does not now make a determination as to

attorney's fees. Plaintiff is ordered to file a motion seeking attorney's fees no later than January 27, 1995.

IT IS SO ORDERED.

DATED: December 15, 1994.

/s/ James M. Ideman
James M. Ideman
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SFIC PROPERTIES, Plaintiff, v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311, Defendants.	CV-94-4870 JMI (JGx) **STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW** (Filed Dec. 15, 1994)

IT IS HEREBY ORDERED:

The Court hereby finds the following Statement of Uncontroverted Facts and Conclusions of Law:

STATEMENT OF UNCONTROVERTED FACTS

1. On June 3, 1992, plaintiff SFIC PROPERTIES, INC. and defendants INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311 had an arbitration proceeding before George E. Marshall, Jr. (hereinafter "Marshall"). Declaration of Michele S. Ahrens in Support of Plaintiff's Motion for Summary Judgment (hereinafter "Ahrens Declaration"), ¶ 2, and Exh. 1; Declaration of Herbert M. Ansell in Opposition to Plaintiff's Motion for Summary Judgment (hereinafter "Ansell Declaration"), ¶ 2.

2. The arbitration addressed the termination of Julio Rodriguez (hereinafter "Rodriguez"), plaintiff's employee, who had been terminated in 1991 for alleged sexual harassment of a female employee and general workplace violations. Ahrens Declaration, Exh. 1; Ansell Declaration, Exh. DX-1, pp. 4-5.

3. The arbitrator issued a decision two years later on April 11, 1994 and determined that plaintiff violated the collective bargaining agreement when it terminated Rodriguez. Ahrens Declaration, Exh. 1.

4. Marshall found that plaintiff did not terminate Rodriguez for just cause and did not provide Rodriguez with notice of his problematic behavior. Ahrens Declaration, Exh. 1.

5. Marshall indicated that a just cause standard is to be inferred in all modern collective bargaining agreements and that a just cause standard requires that an employee be given notice of errant behavior. Ahrens Declaration, Exh. 1.

5. The arbitrator ordered that Rodriguez be reinstated with full back pay. Ahrens Declaration, Exh. 1.

6. A just cause standard for discharge and a requirement that notice of problematic behavior be given to an employee prior to discharge are not express terms of plaintiff's collective bargaining agreement. Ahrens Declaration, Exh. 2; Declaration of Michele S. Ahrens in Support of Plaintiff's Reply to Opposition to Defendant's Motion for Summary Judgment (hereinafter "Second Ahrens Declaration"), Exh. 7.

7. Article II.A. of the collective bargaining agreement states that "[t]he Company retains the exclusive right to manage the business of the facility and the direction of the work force. Among those exclusive rights of the Company, but not limited thereto, is management's right to . . . discipline and discharge employees. . . . " Ahrens Declaration, Exh. 2.

8. Article VIII.B. of the collective bargaining agreement states that an arbitrator may interpret the collective bargaining agreement, but "shall not have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement." Second Ahrens Declaration, Exh. 7.

CONCLUSIONS OF LAW

1. The Court has jurisdiction to review the arbitrator's award pursuant to 29 U.S.C. § 185(a).

2. The scope of review of an arbitrator's award is narrow. A court may overturn an award only if the award does not "draw[ ] its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

3. Pursuant to Federal Rule of Civil Procedure 56, a court may grant summary judgment if the pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

4. This case can properly be resolved by summary judgment because there are no disputes between the parties as to the general facts of the case.

5. The Court must determine whether the arbitrator exceeded his authority by basing his decision on terms that were not specifically stated in the collective bargaining agreement.

6. In California, an employment contract is presumed to be at-will. *See Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 665 (1988). That presumption can be "superseded by a contract, express or implied, limiting the employer's right to discharge the employee." *Id.* An employer's right to discharge an employee at will is also limited by public policy considerations. *Id.*

7. Article II.A. of the collective bargaining agreement provides plaintiff with unlimited authority over employment termination decisions.

8. Article VIII.B. of the collective bargaining agreement limits the arbitrator's authority to add new terms to the collective bargaining agreement.

9. By inferring a just cause standard and a notice requirement into the collective bargaining agreement, the arbitrator added new terms in violation of Article VIII.B. of the collective bargaining agreement.

10. In *Local Union No. 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), the court, relying upon the collective bargaining agreement's inclusion of a provision similar to the management provision in this case conferring upon the employer the exclusive right to discharge and discipline an employee, determined that the intent of the parties was that a showing of just cause would not be required

for termination. As the court suggested, "[c]ause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit." *Id.* at 1387.

11. The Ninth Circuit's holding in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), is distinguishable from the Court's holding in the present case.

12. The arbitrator exceeded his authority in reaching his decision in the present case. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a requirement of notice into the collective bargaining when it was clear that the collective bargaining agreement gave plaintiff unlimited control over discharge.

IT IS SO ORDERED.

DATED: December 15, 1994.

/s/ James M. Ideman
James M. Ideman
United States
District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SFIC PROPERTIES, Plaintiff, v. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311, Defendants.	CV-94-4870 JMI (JGx) **JUDGMENT** (Filed Dec. 15, 1994)

IT IS HEREBY ORDERED:

Pursuant to the Court's Order Granting Plaintiff's Motion for Summary Judgment and Vacating Arbitration Award and Order Denying Defendant's Motion for Summary Judgment, summary judgment is hereby entered in favor of plaintiff SFIC PROPERTIES, INC. and against defendants INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE #94, LOCAL LODGE 311. The arbitration award issued by George F. Marshall, Jr. on April 11, 1994 in the above matter is hereby vacated.

IT IS SO ORDERED.

DATED: December 15, 1994.

/s/ James M. Ideman
James M. Ideman
United States
District Judge

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE NO. 94, LOCAL LODGE 311	)	DISCHARGE OF JULIO RODRIGUEZ
and	)	ARBITRATOR'S AWARD
SANTA FE INTERNATIONAL PROPERTIES, INC.	)	

The undersigned arbitrator, having been selected by the parties in accordance with the arbitration provisions of their collective bargaining agreement, having duly heard the proofs, and reviewed and analyzed the evidence and written argument of the parties, hereby finds and awards as follows:

1. The Company did violate the collective bargaining agreement when it terminated Grievant, Julio Rodriguez for the following reasons supported by the evidence:

   a) Sufficient or just cause will be inferred in all modern day collective bargaining agreements which do not contain an express "just cause" standard for discharge provision;

   b) There is sufficient evidence in the record to infer and conclude the parties intended to have a "cause" standard for discharge when they indicate in their labor agreement "Seniority is lost when service is interrupted according to the following: . . . (e) Dismissal for cause". (JX1, Article IX Seniority).

c) There is sufficient testimonial and documentary evidence in this record to establish that prior to the date of Grievant's discharge, December 13, 1991, the employer was not aware of sufficient cause to warrant Grievant's discharge and had issued only verbal and no written warnings to Grievant in an effort to correct any conduct on Grievant's part which ran afoul of Company rules, policy or State and Federal law.

d) Although there is a conflict in the evidence as to whether a progressive discipline policy existed at the Company, the arbitrator concludes and finds such a policy did exist and finds support for such conclusion in the Company "Employment Termination Notice" (JX5).

e) A labor agreement which contains a cause standard, express or implied, requires an employee be given notice of wrong doing, and an opportunity to correct the errant behavior before the ultimate industrial penalty be imposed, unless the behavior is such which permits immediate discharge. Following the meeting of December 11, 1991, Grievant's last day at work, the Company uncovered a myriad of reasons, upon inquiry and of which it had no prior knowledge, it believed would support his termination at the meeting on December 11, 1991. Grievant was never apprised of these reasons or allegations prior to his discharge nor was there evidence presented to establish any of the allegations occurred except for the foul and insulting language directed at Ms. Benitez and a cake incident. Except for the cake incident, which Grievant admits occurred, Grievant denies at this arbitration hearing that any of the events alleged occurred.

2. There is insufficient evidence in this record to support a finding sufficient cause for discharge existed on December 11, 1991 or on December 13, 1991, the date the termination notice (JX5) was issued stating "DETAILS WILL HAVE TO BE PER PHONE CONTACT – BOB PREECE/LEGAL."

3. If the Company had given notice, followed its progressive discipline policy and conducted an investigation of the information supervisor Vandenberg had learned on November 8, 1991, so as to establish Grievant was in violation of Company rules, policy or creating a hostile environment for its female employees, sufficient cause for discharge would have perhaps been established. Even if Grievant had been suspended pending investigation on December 11, 1991 rather than discharged, so that an investigation could have been made to establish his lack of trustworthiness with specifics rather than an emotional statement Grievant could no longer be trusted because he produced a tape recorder at a meeting between his supervisors and Union representatives might have produced a different result.

4. The grievance is sustained.

5. The appropriate remedy is to reinstate the Grievant with out [sic] loss of seniority or benefits and with full back pay from the date of termination to the date of reinstatement or to the date an offer of reinstatement is made, whichever is earlier, less earnings from outside employment. Grievant is under a duty to mitigate his damages. The arbitrator will retain jurisdiction to assist the parties with the implementation of the remedy.

April 11, 1994
Santa Monica,
California

/s/ George E. Marshall, Jr.
GEORGE E. MARSHALL, JR.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SFIC PROPERTIES, INC., Plaintiff-Appellee, vs. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, aka: IAMAWD, Defendant-Appellant.	No. 95-55139 D.C. No. CV-94-04870-JMI(JG) ORDER (Filed Mar. 10, 1997)

Before: BRUNETTI and RYMER, Circuit Judges, and TANNER,* District Judge.

Judge Brunetti and Judge Tanner have voted to deny appellee's petition for rehearing. Judge Rymer has voted to grant appellee's petition for rehearing. Judge Brunetti and Judge Rymer have voted to reject the suggestion for rehearing en banc and Judge Tanner so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

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* Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

MACHINISTS MAINTENANCE AGREEMENT
ALHAMBRA, CALIFORNIA
1990-1992

This AGREEMENT is entered into this fourteenth day of August 1990, by and between SFIC PROPERTIES INC., HEREINAFTER CALLED THE "COMPANY" and INTERNATIONAL ASSOCIATION OF MACHINISTS, District Lodge 94, on behalf of Local Lodge 311, HEREINAFTER CALLED THE "UNION".

I RECOGNITION

A) The Company recognizes the Union as the sole and exclusive bargaining representative for all employees in the craft classifications set forth in this Agreement, with respect to wages, hours, and other terms and conditions of employment. Excluded are all employees represented under other collective bargaining agreements and all other office, clerical, restaurant, guards, technical, professional, and supervisory employees. The Union recognizes that the Company retains full and exclusive authority over the management of its operations except as expressly limited by the Agreement.

B) When the Company leases an existing office building or a portion of an existing office building to a Tenant, it is the intent of the Company to provide to the leased areas such maintenance and services as may be required (except where such services are provided directly by the tenant), within the classifications listed in Section XXII A)

of this Agreement. Such work will except where temporary staff is needed be performed by employees of Santa Fe Properties Inc.

C) This Agreement shall cover the Company's existing Alhambra establishment only and shall not cover the Company's field operations, field shops, or offices. This agreement shall not cover any new buildings in the Alhambra complex.

II MANAGEMENT OF OPERATIONS

A) Except as specifically modified, delegated or granted in this Agreement, the Company retains the exclusive right to manage the business of the facility and the direction of the work force. Among those exclusive rights of the Company, but not limited thereto, is management's right to operate and manage or close down the operation or any portion thereof; to subcontract work; to direct the work-force; to hire, promote, transfer, lay off, demote, suspend, discipline and discharge employees; to maintain efficiency of employees; to establish and enforce work regulations and rules of conduct of employees; to determine the type of services to be performed to determine and to change or introduce new means or processes by which work is performed; to determine the type of machinery and/or equipment to be installed or used; to schedule work, and in connection with this to establish the number of shifts to be worked in any day, week or month, and the particular shift times, schedule, pattern, or procedure it deems necessary, provided that the exercise of the above prerogatives will not infringe on rights protected in this Agreement. Except as otherwise limited

herein, such matters are the responsibilities and prerogatives of the Company, along with all other rights that have traditionally belonged to the Company, except as specifically limited, modified or delegated by the terms of this Agreement. Rights not expressly waived by this Agreement shall be retained by the Company.

III UNION SECURITY

A) The following shall be subject to and shall be interpreted and administered in a manner to comply with the terms and provisions of the Labor-Management Relations Act of 1947 and any amendments thereto.

B) All present employees who are not members of the Union shall, as a condition of continued employment, become members of the Union within the time required by the Union after the 30th day following the effective date of this Agreement.

C) All persons hereafter employed by the Company who are not members of the Union, shall, within the time required by the Union after the 30th day following the beginning of their employment, or the effective date of this Agreement, whichever is the later, become members of the Union as a condition of continued employment.

D) All employees shall remain members of the Union as a condition of continued employment. No person shall be discharged under this section until the Union furnishes the Company with satisfactory written documentation that the employee has failed to tender periodic dues or initiation fees required. The Union further agrees to indemnify, defend, and hold the Company harmless from

any lawsuit, claim, complaint, action or judgment resulting from actions taken under this section.

E) In hiring, the Company shall not discriminate either for or against Union or nonunion persons. The selection of applicants and the treatment of employees shall be on a nondiscriminatory basis. The Company may request qualified workmen through or from the Union. The names of all employees hired shall be mailed to the appropriate local Union office within three (3) working days from date of hire, and a copy shall be given to the chief steward. Such notice to be on the form furnished by the Union. The Company shall inform each employee hired of the requirements of Paragraphs C and D of this Article.

* * *

C) Step 1, Informal Settlement The settlement of complaints, whenever possible, shall be concluded within the department by the cooperation of the steward and supervisor. If the supervisor and steward are unable to reach agreement within six (6) working days following the presentation of the grievance, the grievance is advanced to Step 2.

D) Step 2, Grievance Meeting "If settlement is not reached in Step 1 the employee shall reduce the grievance to writing within three (3) working days thereafter and present it to the Union. Copies of the grievance shall be given to the supervisor and to the Manager of Facilities. After an investigation is made, but within six (6) working days of receiving the grievance, the supervisor and the steward shall again attempt to settle the dispute. If they

are unable to do so within six (6) working days, a business agent of the Union and the Manager of Facilities or his designee shall meet and again use their best efforts to reach a settlement."

E) Step 3, Labor Relations Committee If agreement is not reached in Step 2, a Labor Relations Committee shall convene to consider the grievance. The committee shall consist of three representatives selected by the Union and three representatives selected by Management. The committee shall review all grievances referred from step 2 by either the Company or the Union.

VIII ARBITRATION

A) Grievances not settled pursuant to Article VI above, may be referred to arbitration by either party. Notice of this intention shall be given to the other party within ten (10) calendar days after the Labor Relations Committee has given its decision. The Company and the Union shall, by mutual agreement, select an arbitrator. If the parties fail to agree on an arbitrator, the United States Mediation and Conciliation Service shall be requested to submit a list of five (5) names. The parties shall alternately strike one name from the list. The last name remaining shall be the arbitrator. The expense of the arbitrator shall be borne equally by the Company and the Union.

B) The Arbitrator shall have the authority to interpret and apply the applicable provisions of this Agreement. But he shall not have the authority to amend or modify this Agreement or to establish new terms and conditions of this Agreement. The decision of the Arbitrator shall be

final and binding on the Company, the Union, and the employee.

C) In consideration of the foregoing, the Union agrees that it will not engage in any strike, slowdown, work stoppage, sympathy strike, or other cessation of work, and the Company agrees that it will not lock out during the life of this Agreement.

IX SENIORITY

A) Seniority is defined as the status secured by length of service while in the continuous employ of the Company. Seniority is lost when service is interrupted according to the following: (a) For personal leave beyond six (6) consecutive months for employees with less than four (4) years seniority or beyond twelve (12) months for employees with four (4) or more years seniority. (b) For sick leave beyond six (6) consecutive months for employees with less than two (2) years seniority or beyond twelve (12) months for employees with more than two (2) years seniority. (c) Layoff for lack of work beyond twelve (12) consecutive months except those with less than one (1) year of seniority, shall have interrupted service after layoffs equal to their seniority time. (d) An unreported absence for five (5) consecutive work days will be considered interrupted service and it will be assumed the employee has quit. (e) Dismissal for cause. (f) A voluntary quit. (g) Failure to report for work within five (5) days after notification of recall.

B) Probationary Period During the first two (2) months of employment, employees are considered to be on probation and may be terminated as determined by the Company.

C) Seniority Lists Upon request of the Union, the Company will furnish seniority lists to the Union.

D) Seniority shall prevail in assigning employees to vacancies on shifts, scheduling vacations, and filling job vacancies, provided skill and experience are equal as determined by the Company. To provide information to employees about job vacancies, the Company will post notice of openings in all classifications, including permanent shift changes, for a period of (3) days. For temporary shift changes, the Company will post quarterly a sign-up sheet for those interested in temporary shift changes from night to day shift. When such an opportunity arises, the Company will offer the temporary shift change to the employees on the sign-up sheet in order of seniority. An employee may remove his name from the list at any time during the calendar quarter, but may only sign up during the employees's first regular shift of the quarter, unless on an excused absence or vacation. The senior employee eligible for a temporary shift change may accept or reject the temporary assignment, but in either case, that employee will then be placed at the bottom of the sign-up list in effect for that calendar quarter.

E) Layoffs and Recalls Layoffs and recalls will be made in order of seniority applied by classification provided skill and experience are equal as determined by the Company. Deviations from seniority may be mutually agreed to between the Company and Union representatives. The

Company shall notify the Union steward and the employees to be laid off on or before the working day prior to the layoff.

* * *

The personal holiday shall be as requested by the employee at a time arranged in advance and agreed upon by the Company.

The employees will be paid for eight (8) hours on their personal holiday. Those employees who work a nine (9) hour day will have the option of taking the ninth hour off without pay or making up that hour at straight time.

B) An employee shall receive holiday pay pursuant to Paragraph A of the Article, only if he was either at work or on his vacation on the regular scheduled workday before or after such holiday, except that when the holiday falls on the day before employment be granted. An employee absent because of industrial injury arising out of his employment with the Company, shall receive holiday pay pursuant to Paragraph 1 of this Article, to the extent that it exceeds the disability compensation to which he is entitled for that day.

XVI VACATIONS

A) For the first year's service with the Company, starting from date of employment, each employee shall be entitled to one (1) week's vacation with forty (40) hours pay. After the second year's service with the Company, and for each anniversary year thereafter, each employee shall be entitled to two (2) weeks vacation with eighty (80) hours pay. After the fifth (5th) year's service with the

Company, and for each anniversary year thereafter, each employee shall be entitled to three (3) weeks vacation with 120 hours pay. After the tenth (10th) year's service with the Company, and for each anniversary year thereafter, each employee shall be entitled to four (4) weeks vacation with 160 hours of pay.

B) Fourteen hundred (1,400) straight-time working hours, worked in each employee's anniversary year, shall qualify him for a vacation as described above.

C) Upon termination for any reason, employees shall be entitled to pay for any earned vacation as described above. In addition, employees terminating prior to becoming eligible for a fully-earned vacation, shall be paid a prorata share of their next vacation. Employee's prorata vacation pay shall be figured on the basis of one fifty-second ($^1/_{52}$) of their vacation amount for each forty (40) straight-time working hours accumulated prior their next vacation anniversary date. Each fifty-second (52nd) shall be figured to the closest whole number when dividing forty (40) into the total straight-time hours worked.

D) Employees absent because of illness or injury, who have not earned a full vacation during their anniversary year shall be credited upon their return to work with all time accumulated toward their next vacation anniversary year, provided that they return within leave of absence limits from the date of illness or

* * *

5) Employees, in order to participate, must fill out an appropriate enrollment card, furnished by the Trust Fund. After the employee has made his individual choice of one of the medical and

hospitalization plans mentioned above, he may elect to change to one of the alternate plans, ie, once each twelve (12) month period, by notifying the Trust Fund Office, in writing during the month of December.

6) The additional cost of providing the benefits provided forherein [sic], over and above the Company's maximum obligation will be borne by each individual employee within the Bargaining Unit on a monthly payroll deduction basis, as set forth above.

7) The total Health and Welfare contributions for all eligible employees will be forwarded by the Company to the District Lodge 94, IAM & AW Health and Welfare Trust Fund, 1545 Wilshire Boulevard, suite #504, Los Angeles, California 90017.

XIX NONOCCUPATIONAL SICK LEAVE PAY

A) Employees shall accumulate sick leave credits at the rate of one day (8 hours) for every two (2) months of active service not to exceed six (6) days credit in any one year. New employees accumulate sick leave credits at the rate of one (1) day for every two (2) months of active service not to exceed six (6) days credit in any one year. New employees are not eligible to take paid sick leave during their first two (2) months of employment.

B) Unused sick leave credits shall be accumulated from year to year up to a maximum of twenty-five (25) days credit. Upon use of all or part of this an employee can rebuild up to the twenty-five (25) days maximum. An employee will be paid for the accrued days over twenty-five (25) of unused sick leave, the first pay period after

December 1, each year. Upon termination for any reason, employees with four (4) months or more continuous service shall be paid for all unused sick leave.

C) Sick leave shall be paid only for absence on regular working days due to nonoccupational sickness or injury starting with the first full working day of absence, except for accrued days over twenty-five (25) as described in Paragraph B above.

D) Sick leave pay shall be integrated with Unemployment Compensation Disability benefits. During the time when an employee is eligible to receive UCD benefits, he shall be paid sick leave at the rate of four (4) hours per working day of absence. These four (4) hours shall be charged against his sick leave credits.

* * *

H) Those employees not at the maximum rate at the time of any wage increase will have the amount of the wage increase appropriate to their classification added to the rate they are receiving on the effective date of the wage increase, but in no case shall any employee exceed the maximum rate. When an employee has been laid off because of a reduction in work load, they will be reinstated to the rate received of layoff (adjusted for any increases) after satisfactorily completing the first two (2) months probationary period.

I) Foreman shall receive at least $1.25 per hour above the base rate for the highest classification supervised.

J) Assistant foreman shall receive at least $1.00 per hour above the base rate for the highest classification supervised.

XXIII CHECK-OFF

The Company shall deduct and mail to the Union monthly, dues for all employees according to a payment schedule provided by the Union.

XXIV TERM OF AGREEMENT

This Agreement shall be effective from August 14, 1990 to February 13, 1992 and thereafter from year to year unless either the Union or the company notifies the other in writing no less than sixty (60) days prior to of its desire to amend or terminate the Agreement.

This Agreement supersedes any and all Agreements heretofore executed by the parties hereto, and, together with any letters appended hereto, constitutes the full and complete understanding of the parties. This Agreement can be altered or amended only by written agreement of the parties.

Supreme Court, U.S.
FILED
JUL 28 1997
CLERK

(2)

No. 96-2034

In The

Supreme Court of the United States

October Term, 1996

SFIC PROPERTIES, INC.,

Plaintiff/Appellee/Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, a/k/a IAMAWD,

Defendant/Appellant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF
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39pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the arbitration award was supported by the language and purpose of the collective bargaining agreement; was authorized by the scope of authority entrusted to arbitrators by the contract; and was in response to the issues submitted to the arbitrator by the parties through their legal counsel?

2. Whether the Petitioner waived the right to challenge the jurisdiction of the arbitrator to determine that, absent just cause, a discharge could properly be vacated?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the above caption. The parent company of Plaintiff/Appellee/Petitioner SFIC Properties, Inc. ("SFIC") is Santa Fe (U.S. Holdings) Inc.

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BASIS FOR JURISDICTION

Respondent agrees that the basis for jurisdiction, as described by Petitioner, is accurate. The judgment of the United States Court of Appeals sought to be reviewed was entered on December 27, 1996. SFIC (herein "Petitioner SFIC") filed a Petition for Rehearing and the order denying the petition was entered on March 10, 1997. This Court has jurisdiction to review the above judgment, by writ of certiorari, pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

On December 15, 1994, The Honorable James M. Ideman, United States District Judge for the Central District of California, granted Petitioner's Motion For Summary Judgment, denied cross-motion by Respondent International Association of Machinists and Aerospace Workers, District Lodge No. 94 and Local Lodge No. 311 (herein "Respondent Union") and Julio Rodriguez (herein "Rodriguez") for summary judgment, and vacated the arbitration award. (Appendix at App. 15). Respondent Union and Rodriguez, in whose favor the arbitration award was rendered, then appealed to the Ninth Circuit Court of Appeals. As stated above, the decision of the Ninth Circuit reversing the District Court ruling was entered December 27, 1996, and Petitioner's application for rehearing was denied March 10, 1997.

The underlying dispute involved the discharge of Rodriguez for alleged sexual harassment. (Appendix at App. 24). Both parties willingly submitted to arbitration which took place on June 3, 1992 before Arbitrator George E. Marshall, Jr., Esq. At no time, until the filing of

post-hearing briefs, did Petitioner SFIC suggest that the arbitrator lacked jurisdiction to determine that just cause was required to effect a termination and that such did not exist in this case. At the hearing, the parties were unable to agree on the precise language of the issues to entrust to the arbitrator. The parties agreed to submit a separate statement of issues and the arbitrator was authorized to frame the issues he felt appropriate after review of the entire evidentiary record and post-hearing briefs. (*See*: EX 6 to motion by Petitioner SFIC for summary judgment [CR 4] – Excerpt No. 3).

The issues that were submitted are as follows:

A. Petitioner SFIC's Statement.

"Did the Company violate the collective bargaining agreement in the terminaiton of Julio Rodriguez?" (Employer's Post-Hearing Brief, pg. 1, lns. 26-27, EX 1 to CR 12).

B. Respondent Union's Statement.

"1. Whether the Employer had just cause to terminate the employment of Grievant Julio Rodriguez on or about December 13, 1991?

"2. If the answer to the above issue is in the negative, what is the appropriate remedy?" (Union's Post-Hearing Brief, ¶ 3, pg. 3, lns. 7-20).

Following conclusion of the hearing, both parties filed written briefs. (UX 1 and UX 2 attached to Declaration of Herbert M. Ansell – CR 12). The arbitrator otherwise took the case under submission.

On April 11, 1994, the arbitrator issued his Decision (Excerpt No. 1) holding, *inter alia*, as follows:

(1) The Company did violate the collective bargaining agreement when it terminated Grievant Julio Rodriguez for the following reasons supported by the evidence:

"(a) Sufficient or just cause will be inferred in all modern day collective bargaining agreements which do not contain an express 'just cause' standard for discharge provisions.

"(b) There is sufficient evidence in the record to infer and conclude the parties intended to have a 'cause' standard for discharge when they indicate in their labor agreement '*seniority is lost when service is interrupted according to the following . . . (e) Dismissal for cause.* (JX 1, Art. IX, "Seniority."). (Emphasis added).

"(c) The Employer was required to give proper notice to the Grievant as to the reasons he was being investigated for possible discharge; and opportunity to remedy the misconduct."

(2) The arbitrator ordered Rodriguez reinstated and extended to the parties an opportunity to attempt agreement as to the amount of financial compensation due and owing.

Review of the briefs of the parties makes clear that the issue of whether "just cause" was to be inferred in the contract was squarely entrusted to the arbitrator, and full argument was tendered therewith. ***Neither the brief of the Employer or the Union suggested that this issue was withheld from the Arbitrator.***

Dissatisfied with the arbitration award of George E. Marshall, Jr., Petitioner SFIC filed a Complaint To Vacate

Arbitrator's Award with the U.S. District Court, Central District of California on or about July 21, 1994. (CR 1). Specifically, Petitioner SFIC alleged that the arbitrator went outside the collective bargaining agreement and exceeded his authority by establishing new terms and conditions to the agreement which were never agreed upon by the parties. In this regard, the arbitrator had concluded that the contract contained a just cause requirement for termination, and a requirement that the employee be given notice of that wrongdoing and the opportunity to correct the behavior prior to his termination. Petitioner SFIC alleged that none of these requirements appear in the collective bargaining agreement between the parties.

On or about December 15, 1994, U.S. District Judge James M. Ideman issued an order granting Petitioner's Motion For Summary Judgment, vacating the arbitration award of George E. Marshall, Jr. and denying Respondent's Motion For Summary Judgment (CR 25). Said order provided, *inter alia*, as follows:

> "The court finds that the arbitrator exceeded his authority in reaching his decision. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a requirement of notice into the collective bargaining agreement when it was clear that the collective bargaining agreement gave Plaintiff unlimited control over discharge. Therefore, the court grants Plaintiff's Motion For Summary Judgment and vacates the arbitrator's award. Defendant's Motion For Summary Judgment is denied. The court does not now make a determination as to attorney's fees. Plaintiff is

ordered to file a motion seeking attorney's fees no later than January 27, 1995."

The court also filed a judgment on December 15, 1994 (CR 27). On or about December 15, 1994, the court filed a Statement Of Uncontroverted Facts And Conclusions Of Law. (CR 26). In said statement, as part of the Conclusions of Law, the court relied on *Local Union No. 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), in which the court had vacated an arbitration award which had inferred a limitation on the Employer's right to discharge. The *Missoula White Pine Sash* court, in this regard, relied on the fact of the inclusion of a provision similar to the managment provision in this case, which conferred upon the Employer the exclusive right to discharge and discipline an employee. The court concluded that the intent of the parties was that a showing of just cause would not be required for termination. The Court provided, *inter alia*:

> "10. As the court suggested, '[c]ause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit.' *Id.* at 1387.
>
> "11. The Ninth Circuit's holding in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), is distinguishable from the court's holding in the present case.
>
> "12. The arbitrator exceeded his authority in reaching his decision in the present case. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a

> requirement of notice into the collective bargaining when it was clear that the collective bargaining agreement gave plaintiff unlimited control over discharge."

On or about March 13, 1995, the United States District Court entered an order granting Respondent's Motion For Reconsideration of order re attorney's fees. (CR 35). As part of said order, Petitioner was barred from seeking attorney's fees as a prevailing party in the district court action.

Respondent Union and Rodriguez appealed to the Ninth Circuit Court which issued a decision entered December 27, 1996. The decision reversed the district court and the Petition for Rehearing filed by Petitioner was denied March 10, 1997.

SUMMARY OF ARGUMENT

As pointed out in the discussion below, the district court judge clearly exceeded his scope of judicial review with regard to his order vacating the arbitration award. *First*, the Petitioner waived its rights to vacate the arbitration award when it entrusted to the arbitrator the issue of whether the discharge of Mr. Rodriguez was proper under the collective bargaining agreement. *Second*, applicable case law shows that the award was clearly supported by the language and purpose of the agreement. *Third*, applicable case law in the Ninth Circuit and other jurisdictions clearly hold that the arbitrator's inference of a just cause standard is appropriate under the circumstances of the instant case. *Fourth*, the decision of the Ninth Circuit Appellate Court is consistent with the well

established teachings of this Court and the federal appellate courts since the *Steel Workers* trilogy in 1960.

ARGUMENT

A. THE ARBITRATION AWARD WAS SUPPORTED BY THE LANGUAGE AND PURPOSE OF THE COLLECTIVE BARGAINING AGREEEMENT; WAS AUTHORIZED BY THE SCOPE OF AUTHORITY ENTRUSTED TO ARBITRATORS BY THE CONTRACT; AND WAS IN DIRECT RESPONSE TO THE ISSUES SUBMITTED TO ARBITRATOR MARSHALL BY THE PARTIES THROUGH THEIR LEGAL COUNSEL. ACCORDINGLY, THE DISTRICT COURT'S ORDER VACATING AWARD, GRANTING PETITIONER'S AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY REVERSED. FINALLY, THE PARTIES TO THE CONTRACT, INCLUDING RODRIGUEZ, EXPRESSLY SUBSTITUTED ARBITRATION FOR THE STRIKE AND/OR LOCKOUT AS A MEANS OF RESOLVING INDUSTRIAL DISPUTES. THIS ALONE IS A STRONG BASIS FOR INFERRING THAT RODRIGUEZ, THROUGH HIS BARGAINING AGENT, SELECTED BINDING ARBITRATION AS A MEANS OF RESTRICTING TERMINATIONS NOT BASED ON JUST CAUSE, RATHER THAN THE STRIKE OR LOCKOUT.

It is elementary that the national interest favors the peaceful and orderly resolution of disputes through the process of arbitration and the avoidance of work stoppages. The commitment to refrain from strike action is recognized as an adequate consideration to support an

undertaking by the Employer to submit grievance disputes to the process of arbitration. As stated in *Boy's Market v. Cook's Union*, 398 U.S. 235, 247-248:

> "As we have previously indicated, a no-strike obligation express or implied is the quid pro quo for an undertaking by the Employer to submit grievance disputes to the process of arbitration."

In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, the Court stated:

> "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the quid pro quo for the agreement not to strike."

A judge is not permitted to substitute his own contractual interpretation for that of the arbitrator. *United Paper Workers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 126 LRRM 3113 (1988); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

In *O'Malley v. Wilshire Oil Co.*, 57 Cal. 2d 482, the California Supreme Court said: "A heavy presumption weighs the scales in favor of arbitrability."

In *Machinists v. Howmet Mfg. Co.*, 366 F.2d 1249 (9th Cir. 1972), the Court stated:

> "The Supreme Court has established a strong presumption in favor of arbitration as the preferred method of settlement of industrial disputes. . . . Although arbitration is a matter of mutual agreement between the parties, and they

> may choose to exclude certain areas of contention from the arbitration process, the standard set by the court for finding a dispute non-arbitrable, is a strict one. ***There must be either an 'express provision excluding a particular grievance from arbitration' or 'the forceful evidence of a purpose to exclude the claim from arbitration. . . . ' The issue is therefore a simple one: is there evidence of a purpose to exclude those grievances from arbitration so that the heavy presumption in favor of arbitration is overcome.***" (Emphasis added).

See also: *Local 1309 v. Aztec Bus Lines*, 654 F.2d 642, 108 LRRM 2412 (9th Cir. 1981); *Irvin H. Whitehouse, etc. v. Nubbt*, 659 F.2d 830, 108 LRRM 2578.

The *Labor-Management Relations Act* (1947), 61 Stat. 154, 29 U.S.C. § 173(d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *See also*: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567.

Several well-reasoned federal and California decisions make clear the strong presumption of validity that attaches to arbitration awards. In *Kroger Co. v. IBT*, 380 F.2d 728 (6th Cir.) the court stated: "A court cannot substitute its judgment or interpretation of a collective bargaining agreement for that of an arbitrator. The fact that the court might have applied a different interpretation . . . is no reason for setting aside the arbitrator's award." *See also*: *Timken v. Local 1233, Steelworkers*, 482 F.2d 1012 (6th Cir.).

In *Baldwin Montrose Chemical Co. v. URW*, 383 F.2d 796, the court stated that the test to determine whether an award should be upheld is as follows: "The standard for that inquiry . . . is whether the award was so unfounded in reason and in fact, so unconnected with the wording and purpose of the collective bargaining agreement so as to manifest an infidelity to the obligation of the arbitrator." *See also*: *Railroad Trainmen v. Central of Georgia*, 415 F.2d 403.

In *Western Iowa Port Co. v. Natl. Brotherhood of Packing House & Dairy Workers*, 366 F.2d 275, the court stated:

> " . . . The issues raised by the union relate directly to the agreement, are on their face governed by the agreement, and the interpetation placed on the pertinent parts of the agreement by the arbitrator are permissible. The arbitrator acted within the scope of his authority under the agreement in rendering the award. This court as well as the district court, need not and cannot pass upon the merits of the award."

See also: *UAW v. White Motor Co.*, 505 F.2d 1193 (8th Cir. 1974); *H.K. Porter v. United Saw, etc. Workers*, 333 F.2d 5596 (3d Cir.); *Independent Petroleum Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, this court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts have the final say on the merits of the awards. . . . The arbitrators under these collective agreements are indispensable agencies in a

> continuous collective bargaining process. They sit to settle disputes at the plant level, disputes that require for their solution knowledge of the custom and practices of the particular factory or of a particular industry as reflected by particular agreements."

Thus, since 1960, and the orignal *Steelworker* decisions, the role of the courts in reviewing an arbitration decision has been seen as limited solely to determining whether the decision "draws its essence from the collective bargaining agreement." The courts do not reweigh the evidence relied upon by the arbitrator in support of the award. *Cannon v. Consolidated Freightways Corp.*, 524 F.2d 290; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593; *Kroger Co. v. IBT*, 380 F.2d 728 (6th Cir.); *Timken v. Local 1223, Steelworkers*, 482 F.2d 1012 (6th Cir.); *Ludwig Harold Mfg. Co. v. Fletcher*, 405 F.2d 1123; *Criggor v. Allied Chemical Corp. etc.*, 500 F.2d 1218 (4th Cir.); *Baldwin Montrose Chemical Co. v. URW, supra.*

In *Truck Drivers & Helpers Union v. Ulry-Talbert Co.*, 330 F.2d 562, 56, 55 LRRM 2979 (8th Cir. 1964), the Court of Appeals defined the "***essence***" standard to mean that judicial inquiry by the district court is to be "***limited to the determination of whether or not the parties had agreed to give the arbitrator power to make the award which he attempted to make.***" (Emphasis added).

The standard has been phrased by some courts thusly: whether the decision is "without foundation in reason or fact." *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403, 411 (5th Cir. 1969). This has been interpreted as requiring only that ***"the award must, in some logical way, be derived from the***

wording or purpose of the contract." *Id.* at 412. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.* (Emphasis added).

See: *Steelworkers v. Enterprise Wheel & Car Co., supra; United Paper Workers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1988) (" . . . as long as the arbitrator is even arguably construing or applying the contract in acting within the scope of his authority, *that* a court is convinced he committed a serious error does not suffice to overturn his decision."). (Emphasis added).

See to same effect: *Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259, 69 LRRM 2878; *Lodge No. 12, District 37, IAM v. Cameron Iron Workers*, 292 F.2d 112, 48 LRRM 2516; *Ludwig Harold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 70 LRRM 2368; *Criggor v. Allied Chemical Corp. etc.*, 500 F.2d 1218, 86 LRRM 3162 (4th Cir.).

In *Stead Motors v. IAM*, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989), the Ninth Circuit stated:

> ***" . . . If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.*** This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneous of any factual findings or legal conclusions." (In accord: *Sheetmetal Workers v. Arizona Mechanical and Stainless Inc.*, 863 F.2d 647, 653). (Emphasis added).

Even as to errors of law, the review is very limited. Absent "manifest disregard" of the law, an award should be confirmed by the court. However, "manifest disregard" presupposes "something beyond and different from a mere error in the law or failure on the part of the

arbitrators to understand or apply the law." *Saix Steamship Co. v. Multifacs Intl. Traders Inc.*, 375 F.2d 577, 582 (2d Cir. 1967).

"The scope of review of an arbitrator's decision in a labor dispute is extremely narrow." *Federated Department Stores v. United Food & Commercial Workers Union Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990). Arbitration awards are upheld so long as they represent a "plausible interpretation of the contract." *Phoenix Newspaper, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993). "A review in court is bound – under all except the most limited circumstances – to defer to the decision of the arbitrator even if . . . that . . . decision finds the facts and states the law erroneously."

An award draws its essence from the collective bargaining agreement when it is based on language in the collective bargaining agreement. *See*: *Stead*, 886 F.2d at 1205 n.6 ("This term [fails to draw its essence] is reserved for those egregious cases in which a court determines that the arbitrator's award ignored the plain language of the contract, that he manifestly disregarded the contours of the bargain expressed in outline by the collective bargaining agreement."); *Jasper Cabinet Co. v. United Steel Workers of America, AFL-CIO, etc.*, 77 F.3d 1025, 1028 (7th Cir. 1996), ("We will uphold an arbitrator's award based upon a misreading of the contract so long as the arbitrator's interpretation is derived from the language of the contract."); *Sullivan v. Lemoncello*, 36 F.3d 676, 683 (7th Cir. 1994), ("All that is required is that the arbitrator's interpretation of the collective bargaining agreement is derived from the language of the requirement."); *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1279 (11th Cir.

1982), (awards not drawing their essence from the collective bargaining agreement reflect neither the language of the collective bargaining agreement nor the intent of the parties.).

Here, the decision of the arbitrator was squarely premised upon interpretation and application of clear language in the context of the facts as determined by the arbitrator and applicable legal principles. *See*: *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 102 LRRM 2571 (9th Cir. 1979).

The Ninth Circuit Court, in the instant case, said the following: "The arbitrator's first rationale – just cause requirements are inferred from all modern day collective bargaining agreements which do not contain an express provision" – is also a sufficient basis for upholding the award. In *Federated*, the Ninth Circuit Court held that an award draws its essence from the collective bargaining agreement even when it is based not on the language in the collective bargaining agreement, but rather on the arbitrator's understanding of the industry and practices, i.e., industrial common law. 901 F.2d at 1497. *See also*: *United Food & Commercial Workers International, AFL-CIO, Local Union No. 634 v. Gold Star Sausage Co.*, 487 F.Supp. 596, 600 n.7 (D. Colorado 1980), (" 'Industrial common law' relied on by arbitrators need not be particular to a certain industry, but can include concepts common to labor contracts").

In this regard, the court stated also: "As it is very common for arbitrators to infer just cause requirements from collective bargaining agreements which are silent on the issue, the award in the instant matter drew its essence

from the collective bargaining agreement between SFIC and the Union. *See also*: *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 917 (5th Cir. 1983), ('In instances where the language of a collective contract does not explicitly prohibit dismissal, except for just cause, arbitrators typically infer such prohibitions from seniority clauses or grievance and arbitration procedures.')"; *Zellenbach Paper Co.*, 73 LA (BNA) 1140, 1142 (1979) (Sabo, Arb.), ("Even where a contract fails to include any general limitations as to the right to discharge, arbitrators have concluded that a just cause restriction is implied in a modern collective bargaining agreement."); *Kenneth A. Sprang, Beware Of The Toothless Tiger: A Critique Of The Model Employment Termination Act*, 43 Am. U.L. Rev. 849, 910 (1994), ("So strong is the tradition of just cause in arbitral jurisprudence that many arbitrators have inferred the existence of a just cause standard in agreements that do not expressly state such a standard."), (" . . . If a just cause requirement is missing from the agreement, and the arbitrator infers its existence from the seniority clause or grievance and arbitration provisions."). The arbitrator's conclusion concerning a broad practice of inferring just cause requirements is well supported and under *Federated*, it is submitted that the award draws its essence from the collective bargaining agreement. *See*: *Federated*, 901 F.2d at 1496.

The general principles regarding the limited role of reviewing courts are deeply embedded in labor and arbitration jurisprudence.

B. ARBITRATORS AND FEDERAL COURTS CONSISTENTLY INFER A LIMITATION OF THE EMPLOYER'S POWER TO DISCHARGE IN THE ABSENCE OF EXPRESS CONTRACT LANGUAGE WHICH EXCLUDES THE ISSUE OF DISCHARGE FROM THE ARBITRATION PROCESS.

In the instant case, the issue of the propriety of Mr. Rodriguez' discharge was entrusted to the arbitrator. While the phraseology of the submission questions propounded by counsel for the Union and Employer respectively differed, at no time was it ever contended prior to or during the arbitration hearing that the arbitrator lacked the jurisdiction to interpret the language of the agreement and determine whether it was appropriate to conclude that the Employer's right of discharge was conditioned on demonstrating proper cause and that of proper notice.

The principle that arbitrators will generally infer such limitation has been demonstrated in a number of arbitration awards. In *Van Waters v. Van Waters & Rogers,* 102 LA (Lab. Arb.) 609 (Dec. 15, 1993) – Arbitrator Marvin Feldman, the arbitrator, stated the following:

> "The Company has also argued in this particular case that the Management Rights clause does not contain a 'just cause' provision and that the Union having negotiated different contracts in and around this area of the country, knows full well that such language exists in contracts and therefore could have negotiated such language."

Rejecting this argument, the arbitrator stated:

> " . . . The general rule is that a Management Rights clause, whether or not it contains a 'just cause' or 'cause' provision in its four corners, is unimportant. ***Overwhelmingly, arbitrators have implied 'cause' or 'just cause' language in the Management Rights clause. That is true whether it is written in the four corners of that paragraph or not. If the Company had intended not to have such language or meaning, then the parties would have negotiated that 'cause' and 'just cause' are not a part of the arrangement between the parties and stated in clear and unambiguous language that such language or thought is not to be considered.***" (Emphasis added).

In *Pfizer, Inc.*, 79 LA 1225 (Arbitrator Melvin Newmark) (1982), the Arbitrator held that a "just cause" limitation was properly to be inferred. The Arbitrator stated in this regard, *inter alia: **"It is part of the 'common law' of industrial relations – one of the tacit assumptions underlying all collective agreements – that an employer shall not exercise arbitrarily his power to discipline workers."*** (Emphasis added).

In *Higgins Industries, Inc.*, 24 LA 453, 455, (Arbitrator Morvant) (1955), it was held as follows:

> "The phraseology 'employees shall lose all seniority rights if they are discharged for cause' – restricts or limits management's right to discharge 'for cause'. . . . The labor-management agreement reduces to writing the rights of the individual worker and protects those rights against any arbitrary or unfair action on the part of the . . . Company."

Again, in a subsequent decision, *Higgins Industries Inc.*, 25 LA 439 440, Arbitrator Hebert considered the same contention and concluded: ***"Despite the absence of a contract clause requiring that discharges be for cause, the employer may not discharge without just cause."*** (Emphasis added).

In *Cameron Iron Works, Inc.*, 25 LA 295 (1955), Arbitrator Bowles held that the standard of "just cause" is implied in a modern collective bargaining agreement.

In *Velsicol Chemical Corp.*, 52 LA 1164 (1959), Arbitrator Oppenheim stated: ***"An employer does not have an unrestricted right to discipline even though a contract or collective bargaining agreement does not specifically limit such right."*** (Emphasis added).

In *Rohr Industries, Inc.*, 78 LA 981, 982 (1982), Arbitrator Sabo summarized the status of the arbitration common law on this point as follows: ***"Today, even where a contract fails to include any general limitations as to the right to discharge, arbitrators have concluded that a just cause restriction is implied in modern collective bargaining agreements in the absence of a provision to the contrary."*** (Emphasis added).

In *Fort Wayne Community Schools*, 78 LA 928 (Arbitrator Clarence Deitsch – 1982), the Arbitrator inferred a "just cause" limitation, stating, *inter alia:*

> "An employer may not use 'reserved rights' to destroy other rights specified in the contract. The Employer's position concerning discharge without showing cause threatens and otherwise compromises the employee rights specified in Appendix B of the Policy Book, particularly

> employee rights stemming from seniority. As Arbitrator Donnaly observed 'if the Company can discharge without cause, it can layoff without cause. It can recall, transfer or promote in violation of the seniority provisions simply by invoking its claimed right to discharge. ***Thus, to interpret the agreement in accord with the claim of a company would reduce to a nullity the fundamental provision of a labor-management provision, the security of a worker in his job.***' *Atwater Mfg. Co.*, 13 LA 747, 749." (Emphasis added).

See to same effect: *Gaten Pepsi Cola Bottling Co.*, 75 LA 154 (Arbitrator Kennan – 1980) ("*Based on an interpretation of various provisions of the contract read in conjunction with the management rights clause, and the contract as a whole, the Arbitrator finds that despite the lack of any express provision providing that discharges shall be only for 'cause' or 'just cause' a proper interpretation of the contract in its entirety compels the conclusion that the company may discharge a regular employee only for 'cause'*; *Cleveland Construction*, 96 LA 354 (Arbitrator Dworkin); *Pacific Power and Light Co.*, 89 LA 283 (Arbitrator Sinicropi – 1987) holding that the propriety of a probationary employee's discharge was to be determined by 'just cause' standard); *Essroc Materials*, 99 LA 664 (Arbitrator John Murphy – 1992). Arbitrator held that just cause was to be implied as a requirement to support the discharge decision; *Village of Herkimer*, 84 LA 1298.

Particularly appropriate is the language in *Paragon Bridge and Steel Co.*, 44 Lab. Arb. 361, 371, an arbitration decision. It is there stated:

> "Inherent in any agreement is an implied undertaking that neither party will do anything which will have the effect of destroying the right of the other party to receive the fruits of its contract. (Citing case). This implied term is commonly applied in commerical agreements. ***It has application with at least equal force in collective bargaining agreements based on the public policy of encouraging collective bargaining.***" (Emphasis added).

In the Law Review article, "*Reflections On Labor Arbitration,*" 723 Harv. Law Rev. at page 1482, ***Professor Archibald Cox suggested that a company in agreeing to pay the wage scales, fringe benefits and observe the other conditions in the contract beneficial to the employees impliedly agrees not to take any action that would destroy the right of its employees to enjoy the fruits of the contract. ". . . In every contract there exists an implied covenant of good faith and fair dealing." Professor Cox thus reasons that an employee can arbitrate a discharge, even when the contract is silent as to just cause, inasmuch as a wrongful discharge would constitute a deprivation of his benefits to the contract.***

The great weight of authority among arbitrators is to interpret the contract as Arbitrator Marshall did in this case.

As in the instant case, federal courts have confronted squarely a number of instances in which the employer has attempted to overturn arbitration awards that inferred a requirement of just cause before an employee could be terminated properly.

In *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union*, 345 F.2d 757, 59 LRRM 2427 (9th Cir. 1965), the contract provided that employees could be disciplined for an unauthorized strike without recourse to arbitration. The employer discharged several employees under that clause and refused to arbitrate the discharges. The ninth circuit noted that the employer's position of non-arbitrability was based on its unilateral determination that an unauthorized strike had occurred, when in fact the contract did not authorize the employer to make such determination. The court concluded that the question as to whether the employees had engaged in an unauthorized strike was a proper matter for arbitration.

In *Johnson-Tombigbee Mfg. Co. v. Local 2462*, 596 F.2d 126, 101 LRRM 2486 (5th Cir. 1979), the company urged the discharge was nonarbitrable based on its unilateral determination that just cause existed. The court held that the contract did not give the employer the right to determine just cause; that if the company wished such right, it should have attempted to negotiate such a contract.

In *Egan v. Wells Fargo Alarm Svs.*, 23 F.3d 1444, *cert. denied*, 115 S.Ct. 319, 146 LRRM 2443 (8th Cir. 1994), the employer, as in the instant case, challenged an arbitration award because the contract did not contain express language limiting discharges to "just cause." The court granted summary judgment confirming the award. The court in this regard pointed to several contract protections that were necessarily undermined if the employer could defeat them by a discharge at will ("continued employment, protection against lockouts, seniority rights pertaining to filling vacancies, job creations, decreases in

force, layoffs and rehiring after layoffs, wage protections and other benefits.")

The court concluded: "***While the Agreement does not contain an explicit 'just cause' or 'good cause' provision, the clear implication of Article XIV is that non-probationary union employees, in contrast to probationary employees, may not be terminated at will or without good cause.***" (Emphasis added).

In *Winery Distillery and Allied Workers Union L. 186 et al. v. E & J Gallo Winery*, 857 F.2d 1384, 128 LRRM 2631 (9th Cir. 1988), the court upheld arbitration of the discharges of several employees who allegedly engaged in violent strike misconduct. The court, in this regard, stated:

> " . . . The employees, covered here by the collective bargaining agreement, are entitled as a matter of contract and federal labor law policy to the benefit secured on their behalf by their union. One of those important rights is to have unresolved grievances decided by an arbitrator. *C.F. Johnson – Tombigbee Mfg. Co. v. Local 2462*, 596 F.2d 126, 101 LRRM 2486 (5th Cir. 1979) (construing exclusionary clause strictly 'in order to give effect to our national policy in favor of arbitration')."

It is clear that federal courts, when confronting the issue of discharges under a contract that does not expressly specify "good cause," have unhesitatingly implied the requirement of "just cause" in order that the rest of the contract protections not be rendered meaningless, and that the national policy favoring arbitration of all disputes be given full deference.

C. APPELLEE SFIC WAIVED ANY RIGHT TO VACATE THE ARBITRATOR'S AWARD. WHERE, AS IN THE INSTANT CASE, ANY ISSUE, INCLUDING THE SCOPE OF THE ARBITRATOR'S JURISDICTION, HAS BEEN UNCONDITIONALLY SUBMITTED AND THE PARTIES ARE BOUND BY THE ARBITRATOR'S DECISION, SUCH DETERMINATION RELATING TO THE ARBITRATOR'S JURISDICTION IS ENTITLED TO THE SAME BROAD AREA OF DEFERENCE AS ANY ASPECT OF THE ARBITRATION AWARD.

Ficek v. So. Pacific Co., 338 F.2d 655 (9th Cir.); *Lattimer-Stevens Co. v. United Steelworkers of America, etc.*, 913 F.2d 1166, 135 LRRM 2573 (6th Cir. 1990) (" . . . ***The extraordinary deference given to an arbitrator's ultimate decision on the merits applies equally to an arbitrator's decision that the parties have indeed submitted a particular issue for arbitration.***") (Emphasis added); *Pack Concrete, Inc. v. Cunningham, etc. et al.*, 866 F.2d 293, 130 LRRM 2490 (9th Cir. 1989) (" . . . ***We now hold that an arbitrator's interpretation of the scope of the issues submitted to him is entitled to the same deference accorded his interpretation of the collective bargaining agreement.***") (Emphasis added); *High Concrete Structures v. Local 166*, 879 F.2d 1215, 131 LRRM 3152 (3d Cir. 1989).

In the instant case, both parties entrusted to the arbitrator the issue of whether the discharge of Mr. Rodriquez was proper under the collective bargaining agreement. While phrased slightly different, both the Employer and Union made an unqualified submission to the arbitrator of this issue. The first time that the issue of an "unqualified right" to fire employees for any reason was raised by Employer's counsel was in its post-hearing

brief. Even then, the brief does not contain any suggestion that the arbitrator lacked power or authority to imply a just cause provision. It simply stated, "Therefore the Company has the exclusive unfettered right to terminate Mr. Rodriguez, with or without cause. On this basis alone, the arbitration award ***should go to the Company.***" (Emphasis added). The Employer argued the point and lost. In the district court below, for the first time, it suggests that the arbitration award somehow is invalid.

It is submitted that by clear, well-established authority the arbitrator's decision, in effect, that he had authority to imply a just cause requirement, and thus invalidate the discharge, is entitled to the same weight and deference as any other aspect of his award. In short, having submitted the issue of "just cause" to the arbitrator, the Employer cannot be heard to urge that because it is disappointed in the award, the award can be properly attacked.

D. THE PETITIONER HAS NOT DEMONSTRATED ANY JUDICIAL SUPPORT FOR THE PROPOSITION THAT IT HAD UNRESTRICTED POWER TO TERMINATE RODRIGUEZ IN THE ABSENCE OF "JUST CAUSE."

The decision in *Local Union 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), heavily relied upon by Petitioner, is inapposite to the instant case. Moreover, it was distinguished by the Ninth Circuit Court below. In *Missoula White Pine Sash*, the company had the express contractual right as follows: "The sole and exclusive right to hire, discipline and discharge any employee." The issue

framed in that case was whether the employer could ***lay off*** (later reclassified as discharge) without cause.

There are two essential points of difference between the *Missoula* case and the instant case.

1. In the *Missoula* case, the issue of "just cause" initially arose in the context of a layoff – not a discharge. The contractual protection available in the instance of "layoff" was not as strong as the seniority language in the instant case in the context of a "discharge."

2. In *Missoula,* the collective bargaining agreement provided expressly that the company had the sole and exclusive right to hire, discipline and discharge any employee.

In the instant case, the collective bargaining agreement provides, *inter alia,* that "Except as specifically modified . . . in this agreement, the Company retains the exclusive right to manage the business of the facility. . . . Among those exclusive rights of the Company . . . is management's right to . . . layoff . . . discipline and discharge employees; . . . ***provided that the exercise of the above prerogatives will not infringe on rights protected in this agreement.***" (Emphasis added).

And again: "Except as otherwise limited herein, such matters are the responsibilities and prerogatives of the Company . . . ***except as specifically limited, modified or delegated by the terms of this agreement.***" (Emphasis added). (*See*: Machinists Maintenance Agreement – Ex 2 to CR 4). Thus, the Employer does not have the unfettered right to discharge without just cause, because to permit this would be to infringe upon the important

rights available to employees under the contract, e.g., wages, medical benefits, pension, holidays, vacation, etc.

In *Dickeson v. DAW Forest Product Co.*, 827 F.2d 627 (9th Cir. 1987), the ninth circuit implied a finding of "just cause" for discharge. The court concluded that the management rights catch-all provision was limited by the provision in the grievance procedure which expressly required reinstatement if a discharge was found to be lacking "just cause" in support thereof. The court in *Dickeson* also stated:

> "We agree that it is not for this court to subvert the collective bargaining process by remaking the collective bargaining agreement . . . and we do not do so here. ***Contrary-wise we find it difficult to imagine a meeting of the minds between an employer and a union authorizing an employer to discharge an employee without good cause. Employee's security goes to the very essence of a collective bargaining agreement.*** (Citations). The effect of unbridled discretion to discharge is particularly severe in such cases as this where an employee has worked for the same employer for many years . . . . ***In light of the requirements of the grievance procedure, and our reluctance to infer that a union would forego job security for its employees, we conclude that the collective bargaining agreement confers a right to discharge only for good cause.***" (Emphasis added).

We submit that the requirement of reinstatement found in the grievance procedure in the *Dickeson* contract is no more significant than the requirement of good cause before ending an employee's seniority; and the implied

right of non-probationary employees to a showing of "just cause" in the instant case.

In *Egan v. Wells Fargo Alarm System*, 23 F.3d 1444, *cert. denied*, 115 S.Ct. 319 (8th Cir. 1994), the express disparate treatment of probationary employees and non-probationary employees was held sufficient to imply protection on the part of a non-probationary employee from discharge without cause. ***Moreover, the court reviewed the total agreement and its panoply of rights and protections, and concluded, in effect, that the loss of job without cause subverts enjoyment of such rights and protections.***

It is submitted that the Management Rights clause in the *Dickeson* contract is extremely similar in all material respects to that in the instant case. This court's decision in *Dickeson* should, therefore, control. It is clear that in *Dickeson* and the instant case, the arbitration award was based on a rational interpretation of the collective bargaining agreement.

See also: *Highland Hospital & Health Center v. American Federation of State, County & Municipal Employees*, 151 LRRM 2629 (W.D. Penn. 1996); *Local 238, I.B.T. v. Cargill, Inc.*, ___ F.3d ___, 150 LRRM 2469 (8th Cir. 1995); *Exxon Shipping Co. v. Exxon Seaman's Union*, 73 F.3d 1287, 151 LRRM 2161 (3d Cir.); *United Transportation Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379, 148 LRRM 2796 (3d Cir. 1995).

By reason of above, Respondent Union and Rodriguez respectfully urge this Court to deny the Petition for Certiorari.

Dated: July 28, 1997

Respectfully submitted,

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(3)

Supreme Court, U.S.
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No. 96-2034

In The

Supreme Court of the United States

October Term, 1996

SFIC PROPERTIES, INC.,

Plaintiff/Appellee/Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, aka IAMAWD,

Defendant/Appellant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, SFIC Properties, Inc. ("SFIC"), respectfully submits this reply brief, pursuant to Supreme Court Rule 15(6), to address a new point raised in Respondent's brief in opposition.

ARGUMENT

SFIC DID NOT WAIT UNTIL THE POST-HEARING ARBITRATION BRIEFS TO ASSERT THE COMPANY'S EXCLUSIVE RIGHT TO DISCIPLINE AND DISCHARGE EMPLOYEES, BUT RAISED THIS ISSUE AT THE START OF THE ARBITRATION HEARING.

In Respondent's Opposition to Petition for Writ of Certiorari, Respondent implies that SFIC did not assert, at the arbitration hearing, the company's exclusive contractual right to discipline and discharge employees, but instead raised the issue as an afterthought in its post-hearing arbitration brief. (See Opposition at pages 1-2.) In fact, however, SFIC raised this issue at the start of the arbitration hearing.

In Respondent's Excerpts of Record filed with the Court of Appeals, Respondent attached several pages of the transcript of the arbitration hearing. (See Excerpt No. 3, attached to the Appendix hereto at App. 1-3.) As reflected at the top of page 11 of the transcript, SFIC's

counsel argued at the beginning of the arbitration hearing that "discipline and discharge are exclusive rights of the management. . . . " (Appendix at App. 3.)

Accordingly, there can be no waiver of this issue as Respondent suggests.

CONCLUSION

Thus, for this reason as well, SFIC respectfully submits that its petition for writ of certiorari should be granted.

Dated: August 14, 1997

Respectfully submitted,

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APPENDIX

IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

IN THE MATTER OF A CONTROVERSY,
Between,
I.A.M. & A.W. DISTRICT LODGE 94, LOCAL LODGE 311
Union,
SANTA FE INTERNATIONAL PROPERTIES, INC.,
Employer.

The arbitration proceedings, taken before Kathy L. McCammon, Certified Shorthand Reporter 5684 for the State of California, commencing at 9:30 a.m., Wednesday, June 3, 1992, held at the premises of Santa Fe International, 1000 South Fremont Avenue, Alhambra, California.

* * *

[p. 11] that discipline and discharge are exclusive rights of the management and the seniority clause doesn't change that nor does it address it directly. We with that in mind, we were unable to agree as to an issue for today. So I think both sides are going to present their open issues to you.

THE ARBITRATOR: All right. Would you like to do that now or do you want to wait later on in the proceedings?

MS. AHRENS: Now is fine. If you are ready for it.

MR. BINGHAM: Now is fine.

THE ARBITRATOR: I am ready.

MS. AHRENS: Okay. The company's issue is did the company violate the collective bargaining agreement in the termination of Julio Rodriguez.

THE ARBITRATOR: Okay.

MR. BINGHAM: Our issue to be presented is whether the employer had just cause within the meaning of the collective bargaining agreement to terminate the employment of the grievant, Julio Rodriguez, on or December 13, 1991, and the second issue of course is if the answer to –

THE ARBITRATOR: One mistake in your issue is you have used the date to which you have not stipulated and that was the 13th. Pardon me. Yes, okay. Forgive me. Repeat your issue for me.

[p. 12] MR. BINGHAM: Whether the employer – and I misspoke originally – whether the employer had just cause to terminate the employment of grievant, Julio Rodriguez, on or about December 13, 1991. And then if the answer to the above issue is in the negative, what is the appropriate remedy?

THE ARBITRATOR: All right. For the sake of convenience and all of those here who are going to be witnesses, I assume everybody in the room save the court reporter has affixed his name to the present witness sheet and if you will all raise your hand you will be sworn in now.

Do you solemnly swear or affirm that the testimony you are about to give in this matter will be the truth and nothing but the truth?

(Mr. Haupt, Mr. Rodriguez, Mr. Robledo, Mr. Sanchez said yes.)

THE ARBITRATOR: Any other witnesses who arrive will be sworn in as they come in. Miss Ahrens.

MS. AHRENS: Are you ready for our first witness?

THE ARBITRATOR: Yes.

MS. AHRENS: Can we go off the record for one moment?

THE ARBITRATOR: Sure.

(Recess taken.)

THE ARBITRATOR: All right. We will go back on the

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